Public Bank Bhd v Kok Lee Wah

HIGH COURT (SHAH ALAM) — BANKRUPTCY NO 29–5581 OF 2001 (CONSOLIDATED WITH BANKRUPTCY NOS 29–538 OF 1991 AND 29–575 OF 1996)
SURIYADI J
11 OCTOBER 2004

Bankruptcy — Discharge — Application — Factors to be considered in granting discharge order — Whether all debts must be settled — Whether application for discharge allowed where some debts still unpaid

Three receiving and adjudication orders were made against the respondent in 1990, 1993 and 1994 which were later consolidated on 24 January 2002 upon the application of the Official Assignee. At the creditors' meeting, the respondent agreed to make a monthly payment of RM50. All the immoveable securities had been realized through public auctions. However, despite payments having been made, there still some debts left unpaid. The respondent made an application for discharge. The senior assistant registrar allowed the application. The appellant appealed to the judge in chamber.

Held, dismissing the appeal:

(1) Whilst it is not in all circumstances that a discharge order can be granted, especially if the applicant has manipulated the legal and judicial system to his advantage, it is also trite that an application is not to be rejected on the ground that all the creditor's debt have yet to be settled. The very promulgation of a discharge procedure is a statutory expression that a bankrupt may be released even before satisfying all the debts (see para 11).

(2) The question of whether the predicament of having been a bankrupt for such a long period, which had deprived the respondent of business opportunities as well as financial facilities and also the stigma attached to it could on balance justify the discharge order, was not the sole question for consideration. It was merely one of the many complex considerations to be looked into by the court (see para 17).

(3) The bankruptcy was brought about by circumstances beyond the respondent's control. The unfortunate factor which was instrumental for her misfortune should not be held against her instead should be viewed as a plus factor in her attempt to get back on her feet (see para 18).

[**Bahasa Malaysia summary**

Tiga perintah penerimaan dan penghukuman telah dijatuhkan ke atas responden dalam tahun 1990, 1993 dan 1994. Perintah-perintah ini kemudiannya disatukan atas permohonan Pegawai Pemegang Harta pada 24 Januari 2002. Semasa mesyuarat pemiutang-pemiutang, responden bersetuju membuat bayaran sebanyak RM50 sebulan. Kesemua harta tak alih yang dicagarkan telah dijual secara lelongan awam. Walau

bagaimanapun, ianya masih tidak mencukupi untuk melunaskan kesemua hutang-hutang responden. Responden kemudiannya membuat permohonan untuk pelepasan. Penolong kanan pendaftar membenarkan permohonan tersebut. Perayu merayu kepada hakim dalam kamar.

Diputuskan, menolak rayuan:

(1) Walaupun bukan dalam semua keadaan perintah pelepasan boleh diberikan, terutamanya jika pemohon telah memanipulasi sistem undang-undang dan kehakiman, ianya juga sudah sedia maklum bahawa sesuatu permohonan tidak akan ditolak semata-mata kerana hutang penghutang masih belum selesai. Prosedur pelepasan adalah satu pernyataan kanun yang seseorang bankrap boleh dilepaskan sebelum kesemua hutangnya dilunaskan (lihat perenggan 11).

(2) Persoalan sama ada kesusahan yang ditanggung oleh seseorang bankrap untuk satu jangka masa yang panjang, yang menyebabkan beliau kehilangan peluang perniagaan serta kemudahan kewangan dan juga stigma yang berkaitan dengannya boleh pada imbangan memberi justifikasi untuk perintah pelepasan, bukanlah satu-satunya persoalan untuk pertimbangan. Ianya hanyalah satu daripada perkara-perkara yang perlu dipertimbangkan oleh mahkamah (lihat perenggan 17).

(3) Kebankrapan responden disebabkan oleh keadaan yang tidak dapat dikawal oleh responden. Faktor malang yang menyebabkan nasib tidak baik ini tidak patut dianggap diambilkira terhadap responden sebaliknya ia patut dianggap sebagai satu yang positif dalam usaha responden untuk bangun kembali (lihat perenggan 18).]

Notes

For cases on application for discharge, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2089–2098.

Cases referred to

Ang Ah Kong, Re [1994] 2 CLJ 738 (refd)
Debtor; Re a (No 612 of 1960) [1964] 2 All ER 165 (refd)
Lau Kah Lay & Anor; ex p Cold Storage (M) Bhd [2001] 6 MLJ 311 (refd)
Mills, Re [1966] 1All ER 516 (refd)
Mohana Sundari d/o M Subramaniam, Re; ex p United Prime Corp Bhd [2004] 5 MLJ 227 (refd)
Ng Chee Leong, Re; ex p D&C Bank Berhad [1997] 1 LNS 337 (refd)
Ng Kok Wah v UMW Industries Sdn Bhd [1995] 2 CLJ (refd)
Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 17, 31, 33, 35(1), (5), 40

Toh Chia Hua (Azman Davidson & Co) for the appellant.

Kok Lee Wah for the respondent
Ita Izwati bte Ibrahim for the Official Assignee.

Suriyadi J:

[1] The following receiving and adjudication orders were made against the applicant, ie one Kok Lee Wah, the current respondent, by the High Court:

1 on 10 December 1990 applied for by Public Bank Berhad in bankruptcy number KL 29–2862 of 1990 (later transferred to Shah Alam);

2 on 30 December 1993 applied for by Hong Kong & Shanghai Banking Corporation Berhad in bankruptcy number SA 29–538 of 1991; and

3 on 22 September 1994 applied for by Perwira Habib Bank Bhd in bankruptcy number KL D3–29–868 of 1993 (later transferred to Shah Alam).

[2] In a gist, the three receiving and adjudication orders were made respectively in 1990, 1993 and 1994. These three cases, on the application of the Official Assignee (hereinafter referred to as the OA for brevity sake rather than the Director General of Insolvency), were consolidated on 24 January 2002. On 23 December 1999, the respondent had filed her statement of affairs which reflected that her total liabilities were RM722,975, which consisted of two unsecured creditors (for a debt of RM156,975) and three secured creditors (for a debt of RM566,000). The unsecured creditors were Perwira Habib Bank (for the sum of RM150,000) and Hong Kong & Shanghai Bank (RM6,975), and as mentioned totalled RM156,975. The secured creditors comprised Public Bank (for the sum of RM520,000 with security worth RM720,000), Malayan Banking (RM46,000 with security worth RM300,000). The liability against the secured creditors grossed RM566,000. The overall liability was RM722,975 vis-a-vis the security supposedly worth RM1,020,000 on paper.

[3] At the first creditor's meeting on 23 February 2000 even though no resolution was made, the respondent had agreed to pay RM50 per month commencing October 1998, with such monthly payment made until June 2002. Further development came in the form of a gazette, bearing number 2854 dated 28 February 2002 notifying creditors to file their proof of debts before 13 March 2003 for purposes of dividend payments. The OA had accepted only RM431,643.53 as proven proof of debt for their payments by the respective creditors, and they were:

Table 1:

	Creditors	Sum Claimed (RM)	Sum Accepted (RM)
1	Public Bank Bhd	403,827.05	262,525.91
2	Public Bank Bhd	77,174.03	76,333.91
3	Malayan Banking	46,295.67	(Rejected)
4	Perwira Affin Bank	361,167.02	93,783.71
			431,643.53

[4] On 11 June 2002, one Miss Chan Hing Chen had deposited with the OA a sum of RM40,000. Apart from a left over credit of RM2,131.77 together with the new deposit the sum in the estate of the respondent was RM42,131.37, sufficient to declare a dividend of 8.26% to three creditors who had proven their respective claims, after taking into account the costs of administration and expenditure of the OA in the bankruptcy proceedings.

[5] From the evidence, and not disputed by the appellant, all the immoveable securities charged to Public Bank and Malayan Banking had been realized through public auctions. Despite payments having been made some debts were still left unpaid, hence the current problem.

[6] Under the law, an undischarged bankrupt may apply for a discharge at any time after the adjudication, and the hearing may take place, naturally, once the public examination has been concluded (ss 17 and 33 of the Bankruptcy Act 1967). Here both requirements had been complied with. As the facts revealed, the respondent here had adverted to that statutory right, when she eventually had applied to court to have the order of discharge, whereby if successful she could be released from all provable debts incurred before the bankruptcy except for the statutory exceptions (s 35(1) and (5)). Certain debts in the like of any debt to the Government of Malaysia or state or debts to any branch of the public revenue must continue to be serviced. Non-provable debts as stated in s 40 of the Bankruptcy Act 1967 certainly too is not released. To clarify further, that discharge unlike an annulment order, will not place her back to her legal status prior to the adjudication order.

[7] Creditors must be informed of the discharge application not less than fourteen days before its hearing, in which proceeding the court will be assisted by the OA's report. Any creditor may oppose the release of the bankrupt, giving their reasons for that opposition, followed by the court

order. That report of the OA shall be prima facie evidence of the statements contained in it, which will divulge the bankrupt's conduct and affairs including his conduct during the proceedings under his bankruptcy. Where granted, the order of discharge will be one of the following alternatives:

(a) an unconditional discharge, which releases the bankrupt immediately;

(b) a suspension order. This order suspends the operation of the discharge order for a specified time or until a certain dividend has been paid;

(c) a conditional order. This is an order of discharge subject to any conditions with respect to any earnings or income, which may afterwards become due to the bankrupt or with respect to his after-acquired property. After two years, on certain permitted statutory grounds, he may apply to the court to have such conditions suitably amended (*Ng Kok Wah v UMW Industries Sdn Bhd* [1995] 2 CLJ; *Re Ang Ah Kong* [1994] 2 CLJ 738; *Jonah's Key to Civil Procedure in Malaysia and Singapore*); and

(d) a conditional and suspension order. Such an order is in effect a combination of orders (b) and (c) (see *Re Mills* [1966] 1 All ER 516).

[8] During the proceedings, the court may hear the OA or any of the creditors, and may also question the debtor and receive such evidence that is necessary to arrive at the correct decision. The court may enquire into any questionable or fraudulent settlement primarily to defeat creditors or was unjustified having regard to the state of his affairs. The court may even, as a condition for a discharge order, order the bankrupt to consent to judgment being entered against him for the balance of debts provable in the bankruptcy or any part thereof. Whether the OA supports or opposes the application is merely a factor for consideration by the court. In other words, the application conducted before the court will be dealt with in quite similar fashion to any normal non-bankruptcy related application.

[9] This current application was made before the senior assistant registrar and the only creditor that objected to it was Public Bank, ie the current appellant. At the conclusion of the hearing on 20 June 2002, the discharge application was allowed. Being dissatisfied with that order, the appellant Public Bank had filed a notice of appeal to the judge in chambers, and I had thereafter heard the appeal. Before me, the OA had dutifully submitted the relevant report to the court, and had meticulously laid down the history of the case, conduct and background of the respondent, her current well being, the relevant financial information regarding the matter at hand, and all the other pertinent matters that could assist the court. Even though the report was silent as to the stance of the OA, in open court the latter had clearly stated that her office was not objecting to the application. Needless to say I did the needful, amongst others, hearing the necessary views of the creditor and after having considered all the relevant evidence I had dismissed the appeal with costs. Being dissatisfied with this decision the appellant had filed a notice of appeal to the Court of Appeal.

A brief summary of my reasons for allowing the discharge

[10] During the hearing, I started off by reading the OA's report and thereafter the contents were inevitably adverted to before arriving at my eventual decision. I also had the opportunity of reading the notes of proceedings recorded by the senior assistant registrar and had alluded to them for purposes of appreciating the facts of this case. I was not shackled in anyway by the latter's decision, for as far as I was concerned, the appeal was on a rehearing basis. I was entitled to open up the matter again and reassess the evidence the way I saw fit (*Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97; *Re Lau Kah Lay & Anor; ex p Cold Storage (M) Bhd* [2001] 6 MLJ 311).

[11] It must be clearly stated that, as much as I agree that it is not in all circumstances that a discharge order be granted, especially if the applicant has manipulated the legal and judicial system to his advantage, it is also trite that an application is not to be rejected on the ground that all of the creditor's debt have yet to be settled. The very promulgation of a discharge procedure is a statutory expression that a bankrupt may be released even before satisfying all the debts (*The Law and Practice of Bankruptcy in Malaysia* by Khoo Kay Ping; *Re Ang Kong* [1994] 2 CLJ 738).

[12] It was not denied by all parties that there was a credit of RM42,131.37 in the estate of the bankrupt, after a sum of RM40,000 had been deposited much earlier. With respect to the appellant, the latter sum is not pittance in relation to the debt due. It certainly is not pittance for a bankrupt or for that matter for anyone who is not declared a bankrupt (*Re Ng Chee Leong; ex p D&C Bank Berhad* [1997] 1 LNS 337). In the latter case, the controversial sum meant for the dividend was a mere RM3,000, by comparison a pittance to the sum lawfully owing to the creditor or for that matter the current RM40,000. This third party in the current case who had contributed to that sum must have been overboard with satisfaction with the conduct or promises of the respondent, to hazard such a large contribution to free the respondent from her financial incarceration. This sum was confirmed by the OA to be sufficient to declare a dividend of 8.26% for the proven debts after taking into account the costs of administration and expenditure of the OA in the proceedings.

[13] The respondent is 48 years of age, married to one Yong Kuan and blessed with three children who are between the ages of 14 to 17 years. After having suffered about 10 years of bankruptcy related life, a second chance ought to be given to her and her family in the circumstances of the case. If not for her, at least her children should be given a chance, and not consistently be under a cloud of gloom and public ostracization. There is no written or unwritten policy that a bankrupt must be chained to his new fate just because he had the temerity to be a bankrupt for some reason or other. Every citizen deserves a second chance, especially if the court is satisfied that he is worthy of it.

[14] The husband works as a freelance architect whilst she works as an AIA insurance agent earning about RM2,000 per month. They certainly were moving on with their life. The ever faithful husband should not be made to suffer and his career be cramped just because of her predicament. To avoid punishing the family, and to avoid a bankruptcy proceeding to be a recourse of punishment, when permissible and necessary, the court should not hesitate to extend all the help and sympathy to the non-bankrupt spouse to stabilize that family unit.

[15] All the charged properties in this case had been successfully been sold off. As regards the appellant's judgment against the respondent, the secured property held by Public Bank had been foreclosed for a sum of RM290,000, with that sum immediately utilised by Public Bank to pay off part of the larger sum. Without appearing critical, and picking up from the complaint of the respondent, there must have been some element of negligence on the part of the appellant when a house valued at RM600,000 had been auctioned off for a mere RM290,000. The respondent had vehemently complained that, had there been honesty and diligence, with the charge being sold for the actual market sum, she would never have to suffer the current indignities.

[16] Apart from the above unsatisfactory nonchalant behaviour of the appellant, the OA in open court had stated that after deducting the above 'foreclosed' sum, a balance of RM168,894.20 was still left unpaid. The inflated sum came about from the combined interest of the latter sum which grossed RM92,631.70 hence the sum of RM261,525.91 allegedly left unpaid. Needless to say, the RM50 per month payment could not have extricated herself from the life of bankruptcy, unless the court made certain legal adjustments for her. Apparently another RM21,000 was recently paid into the estate meant for distribution, and hence available to reduce the debt to RM240,525.91. Without the interest the actual debt left would have been RM 147,874.21. And this sum has yet to take into account the sum of RM42,131.37 embedded in the estate account. The figures adduced are intentionally meant to highlight the fact that the respondent had never evaded her responsibilities to reduce her debts whenever she had the money. Needless to say if the house had been sold for RM600,000 there would not have been any necessity to split hairs over the balance of the debt.

[17] Even if I were to accept the appellant's assertion that a substantial sum still remained unpaid, I ask myself whether the predicament of having been under a cloud of bankruptcy for such a long period, which had deprived her of business opportunities, borrowing money from any financial institution, and in the meanwhile constantly embarrassed by the stigma could justify the discharge of the balance. In other words, the sufferings under the bankruptcy order could be equated with the balance of the debt (or read from another angle, the unpaid debt had been sufficiently repaid by the long sufferings under that cloud of bankruptcy). After due consideration and notwithstanding the emotive factor attached to it, I concluded that it would take more than just this ground to justify a discharge of the bankruptcy. It is merely one of the many complex considerations to be looked into by the court.

[18] The reason for her bankruptcy was on the ground of her being one of the four guarantors who had guaranteed on loans that were advanced by the creditors. As a consequence of some company problems, whereupon the company had suffered financial problems pursuant to a deadlock in the administration, the fall-out was that she too suffered financial drawbacks eventually resulting in her current predicament. In brief the bankruptcy was brought about by circumstances beyond her control. This unfortunate factor, which was instrumental for her misfortune should not be held against her but a plus factor at this stage in her attempt to get back on her feet (*Re a Debtor (No. 612 of 1960)* [1964] 2 All ER165).

[19] I was also informed by the OA that all the evidence pointed to the fact that she had not committed a single offence under the Bankruptcy Act or even under the Penal Code (see *Re Mohana Sundari d/o M Subramaniam; ex p United Prime Corp Bhd* [2004] 5 MLJ 227). Up to date her conduct has been satisfactory.

[20] As far as I was concerned, as the OA's report was prima facie evidence, I accepted the proved debt of RM431,643.53. The inflated sum consistently harped on by the appellant was never proved nor the proven debt ventilated by the OA ever disproved by the appellant. The content of the report had been based on the debtor's affairs and her answers given at the public examination and enquiry conducted pursuant to the requirement of the statutory law (s 31 of the Bankruptcy Act 1967). I therefore could not accept the assertion of the appellant without more that the proved debt should be rejected. Interestingly enough, even though the appellant was battling the issue for the other creditors, none of them had come forward to substantiate the appellant's bare assertion. A simple supporting affidavit by them could have helped out but that was not to be.

[21] It was based on all the above reasons that I had dismissed the appeal.

Appeal dismissed with costs.

Reported by I Izzuddin